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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1982.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,

v.

BOSTON CHAPTER, NAACP, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

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Question Presented.

Can a district court in an employment discrimination case grant increased competitive job security to junior minority city firefighters who are not victims of past discrimination by suppressing a *bona fide* civil service statute requiring layoffs by seniority exclusively, to the detriment of senior non-minority firefighters then terminated out of seniority?

List of Parties.

The parties listed in the caption were the parties in district court intervenor Local 718's appeal in Court of Appeals No. 81-1642. In addition, the Civil Service Commission and Director of Personnel Administration of the Commonwealth of Massachusetts were defendants in the district court and appellants in No. 81-1656.

Pedro Castro and the Civil Service Commission and Director of Personnel Administration were plaintiffs/appellees and defendants/appellants in the district court and the court of appeals in a separate action consolidated for administration and argument in the district court and the court of appeals. Boston Police Patrolmen's Association, Inc. is an intervenor and appellant in that separate, administratively consolidated action.

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No.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Boston Firefighters Union petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit, requesting this court to review the First Circuit's judgment in *Boston Chapter NAACP, et al.* v. *Beecher, et al.* (CA 1, Nos. 81-1642, 81-1656, 81-1650, and 81-1651, May 11, 1982).

Opinions Below.

The consolidated opinion of the court of appeals is reported at F.2d and 28 FEP Cases 1657 and is reproduced at pages A1 through A26 of the Appendix hereto. The consolidated opinion of the district court is reported at 522 F. Supp. 873 and is reproduced at pages A30 through 38 of the Appendix. The Memorandum and Order of the court of appeals denying petitioner union's motion to stay the district court's order is reproduced at page A49 of the Appendix.

Previous opinions of the First Circuit and the district court in the separate cases are reported thus: *Boston Chapter, NAACP, Inc.* v. *Beecher, et al.*, 504 F.2d 1017 (CA 1 1974), *cert. denied*, 421 U.S. 910 (1975); 371 F. Supp. 507 (D. Mass. 1975); 423 F. Supp. 696 (D. Mass. 1976), and *Pedro Castro, et al.* v. *Beecher, et al.*, 334 F. Supp. 930 (D. Mass. 1971); 459 F.2d 725 (CA 1 1972); 365 F. Supp. 655 (D. Mass. 1973); 386 F. Supp. 1281 (D. Mass. 1975). The former case is referred to as the "fire case," and the latter case as the "police case" by the court of appeals.

Jurisdiction.

The court of appeals entered its judgment on May 11, 1982. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

The constitutional provisions are: the equal protection component of the Due Process Clause of the Fifth Amendment.

The statutes are: 42 U.S.C. §§ 1981, 1983, 1988, and sections 703(a), 703(h), 703(j), 706(g), Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a), 2000e-2(h), 2000(e)-2(j), and 2000(e)-5(q); and Mass. Gen. Laws, Chapter 31, §§ 33 and 39.

Their terms are produced at A39 through A47 of the Appendix.

Statement of the Case.

A. *Introduction*

The court of appeals affirms an order of the district court which . . . "superseded the operation of the reverse seniority provisions of the Massachusetts Civil Service Statute. . . ." App. 16. The district court's order authorized Boston's termination of senior non-minority firefighters and its retention of junior black and Hispanic firefighters who were never victims of practices found illegal in 1974. The seniority statute, Mass. Gen. Laws, Ch. 31, § 39, enacts a bona fide seniority system, and was not adjudicated otherwise. The acknowledged objective of the order below was the maintenance of current racial and ethnic balances in the public safety departments: the district court proceeded on the premise that "[i]t is a percentage matter . . .: whether or not a certain percentage has to be maintained, increased, or decreased."

B. *The 1974 Decree*

Black and Hispanic applicants for firefighter appointments in Boston and other Massachusetts cities and towns and their associational representative (NAACP) commenced a class action in 1972 asserting that recruitment and certification procedures, and specifically the firefighter entrance examination developed and administered by the former Massachusetts division of civil service,* discriminated racially in violation of 42 U.S.C. §§ 1981 and 1983. Early the following year,

* The Massachusetts civil service structure changed effective July 1, 1975. The functions of the former division are now divided between the civil service commission and the personnel administrator.

the United States initiated another action asserting section 1981 and Title VII claims. The actions were consolidated.

The firefighter entrance examinations administered from 1968 through 1971 were found racially discriminatory on statistical grounds and lack of job relatedness. Word-of-mouth recruitment policies were also held to have resulted in unintentional discrimination. 371 F. Supp. 507, 510, 517 and 519-20 (D. Mass. 1974), 504 F.2d 1017 (CA 1 1974), *cert. denied*, 421 U.S. 910 (1975).

The 1974 decree required development and use of a job-related entrance examination; established priority certification groups and procedures for certification of firefighter job candidates; and directed that its procedures should apply to all cities and towns subject to the civil service statute having a 1% minority population until the complement of minorities in the fire department of such a municipality was commensurate with its minority population. *Id.* at 520-24. The court of appeals affirmed, 504 F.2d 1017 (CA 1 1974), *cert. denied*, 421 U.S. 910 (1975).

Priority certification groups established for each fire department, from which the state division of civil service issued certifications of qualified candidates to each requisitioning department were: A "Group A" comprised of all black and Hispanic applicants who had failed the August 1971 or an earlier discriminatory entrance examination, but had passed the new examination; a "Group B" comprised of all persons on the division's eligibility lists developed from the August 1971 examination; a "Group C" comprised of all black and Hispanic candidates who passed a new examination excluding all Group A members; and a "Group D" comprised of all candidates other than members of Groups A, B, or C who passed a new examination. 371 F. Supp. at 522.

Candidates for Boston permanent fire department appointments were to be certified on the basis of one certification of

a victim from Group A for each certification from Group B until exhaustion of Group A; and thereafter, one certification was to be made from Group C for each certification from Group B. Put another way, all black and Hispanic candidates for Boston permanent appointment who had failed a discriminatory examination and passed the new one, (the victims) had an absolute priority over black and Hispanic candidates who never took a discriminatory test. No certification pairings between Group B and Group C occurred until after completion of the pairings between Group B members and all of Group A's members.[1]

C. *Post-1974 Examinations and Recruitment*

Under the auspices of a detailed April, 1975 interim consent decree, a specified new entrance examination was administered in July, 1975. This interim decree also directed that further examinations should be administered if that new examination did not yield sufficient Group C populations or if Group C's population became depleted.

As of April 1, 1977, the Boston Group C had been depleted and its Group C pool had to be repopulated through new examinations in July, 1977; June, 1978; and June, 1980. No Group C candidate who passed one of the four examinations was ever eligible for Group A membership by having failed any discriminatory earlier examination.

This 1975 and later orders implementing the 1974 decree, put major emphasis on effective preexamination recruitment. While the private and government plaintiffs expressed

[1] Prior to the first new examination and the start of the certification pairings, a 1975 interim decree contracted Group B's membership to all persons appointed as *provisional* firefighters per earlier court authorizations. Group B permanent appointments were deferred pending pairings with Group A or C certifications. Seniority under Mass. Gen. Laws, Ch. 31, § 33 commences only on permanent appointment.

reservations about recruitment prior to the 1978 examination, their criticisms on this occasion were resolved; and each new 1975, 1977, 1978 and 1980 firefighter entrance examination was preceded by satisfactory minority recruitment.

D. *Post 1974 Hiring*

Boston's permanent firefighter appointments after the establishment of Group C through to the 1981 layoffs are:

	Total Hired	*Blacks and Hispanics Hired*	*Non-Minorities Hired*
1976	79	34	45
1977	198	90	108
1978	179	87	92
1979	52	27	25
1980	45	10	35

Since every Group A victim member had priority over Group C member candidates and since Boston's initial Group C population was depleted by April 1977 (without another Boston eligibility list being in place earlier than November 1977), the 124 black and Hispanic persons hired in 1976 and 1977 included all victims of the August 1971 and earlier discriminatory examinations and deficient recruitment. It is possible under the terms of the 1974 decree that the Group A victim category could be revived, but inquiry has not identified the existence of a single instance of such a revival.

Conversely, and significantly, the 117 black and Hispanic firefighters appointed in 1978, 1979, and 1980 were first-time new entrance examination candidates who enjoyed the benefit of satisfactory recruitment programs.

E. *The 1981 Layoffs*

Early in July 1981, Boston initiated a systematic program of terminations from its fire department because of alleged fiscal exigency. Prior to commencement of the layoff waves, Boston's fire department employed 1690 sworn personnel, of whom 248, or 14.7% were black or Hispanic persons. If the 207 layoffs *announced* by Boston had observed the seniority layoff terms of Mass. Gen. Laws, Chapter 31, § 39, 113 blacks or Hispanic persons, all hired in 1978 through 1980, would have been terminated. Their layoffs would have left a 9.1% black and Hispanic representation in the Boston fire department.[2]

Instead of stopping at that announced target, Boston's program extended to 257 discharges. The August 7, 1981 order permitted termination of only 38 blacks and Hispanic firefighters so that implementation of the final reduction program demanded termination of 219 non-minority firefighters (including a very substantial number enjoying superior statutory seniority to that of retained black and Hispanic members). If statutory seniority had been observed, the final layoffs would have extended into but not through the 1978 hires. However, Boston had to retain all of the black and Hispanic firefighters hired in 1978 (save for one individual) by terminating all non-minority firefighters hired in 1978 and 57 non-minority firefighters hired in 1977. Approximately another 50 non-minority firefighters appointed in 1978 would have also retained their jobs if the seniority statute regulated the order of layoffs. Thus, over 100 non-minority firefighters saw their seniority extinguished through a district court order that insisted on its suppression, resulting in their discharge.

[2] At the outset of the litigation in 1972, that percentage was only 0.9%.

The Court of Appeals acknowledges that the approximately 100 retained junior black and Hispanic firefighters so preferred were not identified victims of past acts of discrimination[3] and that this case is "a case of two competing rights, earned seniority versus ... racially balanced police and fire departments." App. 24.

F. *The 1982 Recalls*

During April 1982, Boston rehired 100 laid off firefighters. Under the seniority statute, Mass. Gen. Laws, Chap. 31, § 39, rehirings must follow seniority. However, compliance with the August 7, 1981 order demanded that Boston rehire 15 junior black and Hispanic firefighters whose seniority was inferior to that of 15 non-minority laid off employees who continued in unemployment.

In June 1982, Massachusetts enacted an omnibus-type bill providing Boston with new revenues. A feature of that special legislature is a requirement that Boston rehire all police officers and firefighters terminated since July 1, 1981. All personnel available for recall were reinstated by July 1, 1982. However, their reinstatement does not erase the salary losses inflicted by the terminations and the interruption of their employment may defer their eligibility to sit for promotional examinations.

The August 7, 1981 order enjoined the Massachusetts Civil Service Commission from disapproving any appeals of terminations contesting the method of termination set forth in the order. Appeals followed to that Commission and are pending, with reservations of appellants' rights pending this final review of that August 7th order.

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[3] There are even doubts that a substantial number of these retained junior personnel were old enough to have taken the 1968 through August 1971 examinations.

Reasons for Granting the Writ.

I. This Decision Conflicts with Decisions of the Second, Third, Fifth and Seventh Circuits.

Racially conscious hiring factors are not challenged by nor implicated in this petition. At issue are job losses to non-minority firefighters despite their valid superior seniority because of a court order insulating junior black and Hispanic employees from discharge.

Setting aside a seniority system to secure racial preferences for job retentions conflicts in principle with decisions of this court, and is in total conflict with decisions of other courts of appeals. Racially neutral layoff systems operating on the seniority principle have been sustained against attacks mounted under Title VII and 42 U.S.C. §§ 1981 and 1983 by the second, third, fifth and seventh circuits. *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (CA 7 1974), *cert. denied*, 425 U.S. 997 (1976); *Jersey Central Power & Light Co.* v. *IBEW, Local 327*, 508 F.2d 687 (CA 3 1975), *cert. denied*, 425 U.S. 998 (1976); *Watkins* v. *Steelworkers, Local 2369*, 516 F.2d 41 (CA 5 1975); and *Chance* v. *Board of Examiners & Board of Education*, 534 F.2d 993 (CA 2 1976), *cert. denied*, 431 U.S. 965 (1977).

Chance v. *Board of Examiners & Board of Education, id.*, conflicts squarely. There, a class action on behalf of minority candidates pursued under 42 U.S.C. §§ 1981 and 1983, challenged examinations and job placements were made through court orders. Several years later, layoffs ("excessings") were announced for fiscal reasons and the district court entered an order virtually identical to the one contested here: maintenance of its percentages required layoffs of non-minority employees possessing superior seniority under statutory and collectively bargained provisions. The second

circuit reversed, holding that racially neutral layoff systems using the seniority principle must be protected, and that a nonremedial distortion by preferential treatment racially was illegal discrimination. *Chance*, *id.*, in its essential premises presents the same issues raised in this case.

Local 718 acknowledges that decisions of the sixth circuit support the holding below: *Stotts* v. *Memphis Fire Department*, Nos. 81-5348 and 81-5349 (CA 6, May 7, 1982), 28 FEP Cases 1491, most recently sustained a district court's order enjoining any reduction in the percentages of blacks in fire department classifications, even though the order conflicted with a bona fide seniority system. Circuit Judge Martin, concurring and dissenting, disavows the holding of the panel, noting ... "this court has not been presented with the contention that the decree constitutes 'reverse discrimination.' " *Broum* v. *Neeb*, 644 F.2d 551, 564 (CA 6 1981) does hold that a seniority system can be set aside by an order identical in its substantive terms to the August 7, 1981 order disputed here.[4] Another panel in the sixth circuit denied the same relief in *Youngblood* v. *Dalzell*, 568 F.2d 506 (CA 6 1978).

The conflicts between the position of the second, third, fifth, and seventh circuits and the position of the first and sixth circuits commend granting the writ.

The context in which these divergent views arise also commends its grant. Petitioner, Local 718 believes that many states provide in civil service and personnel statutes for seniority as an exclusive or significant factor in work force

[4] *Brown*, *id.*, acknowledges that *Teamsters* v. *U.S.*, 431 U.S. 324, (1977) immunizes a *bona fide* seniority system from a Title VII attack but deems *Teamsters* inapplicable to suits under 42 U.S.C. §§ 1981 and 1983. This asserted distinction so important to *Brown*'s result seems meritless in light of *New York Trans. Auth.* v. *Beazer*, 440 U.S. 568, 583 (1979); other circuit court decisions reject any broader power under sections 1981 and 1983, i.e. *Setser* v. *Novak Inv. Co.* (CA 8 1981), *Gurmankin* v. *Constanzo*, 556 F.2d 184 (CA 3 1977). *See*, *infra*, pp. 15, 6.

reductions.[5] This wide use of seniority in conjunction with the current apparently national trend towards fiscal retrenchment in local governments[6] suggests that this issue of seniority suppression to sustain commensuration will be recurrent. It is an issue of national importance and its resolution will affect minimally thousands of employees in the public and private sectors. This diversity in circuit views and the significant character of the underlying issue fully warrant grant of certiorari. *Calhoun* v. *Harvey*, 379 U.S. 134, 137 (1964).

II. This Decision Conflicts with Applicable Decisions of this Court and Presents Important Questions of Federal Law which Should be Settled by this Court.

The Court of Appeals rejects decisions of this Court dealing with seniority issues in employment discrimination cases. Instead that court now casts this action as one to correct a racial imbalance, and not litigation to secure individual relief. App. 22. This present characterization, doubtful in its own premises, cannot disguise the litigation: it is a suit by black and Hispanic *applicants*, individually and as class representatives contesting a public protection service entrance examination and recruitment practices. Its pleadings, theories, proofs and prior orders have always defined an employment discrimination case of a conventional and familiar character. The principles set forth in this Court's decisions during the past decade control its course.

Competitive seniority is now the focus of the litigation. The decision below insists that a seniority system regulating

[5] Citations are collected in the Appendix at p. A47, 8.

[6] *See:* Petition for Certiorari, *Local 66, Boston Teachers Union, AFT, AFL-CIO* v. *Boston School Committee*, No. 81-2306, p. 10. Seventeen thousand, five hundred state and local government employees filed employment security claims at the Massachusetts Division of Employment Security during FY 1982. *The Boston Globe*, July 1, 1982, at 40, col. 3.

layoffs must yield to a judicial mandate that specific racial and ethnic population percentages be maintained in a fire suppression force.

This seniority issue is a familiar and typical one. The seniority layoff statute, Mass. Gen. Laws, Ch. 31, § 39, satisfies the criteria of neutrality, rationality in the relevant employment sector, and freedom from discriminatory genesis and from illegal purpose approved by *Pullman-Standard, Div. of Pullman, Inc.* v. *Swint*, ___ U.S. ___, 50 U.S.L.W. 4425, (April 25, 1982) and *Teamsters* v. *United States*, 431 U.S. 324, 355-6 (1977). No party has suggested otherwise and its bona fide character is conceded. *American Tobacco Co.* v. *Patterson*, ___ U.S. ___, 50 U.S.L.W. 4364, 4367-8 (April 5, 1982) and *Teamsters*, 431 U.S. at 348-57 immunize this seniority system from the suppression directed below.

The controlling principle here is not novel. It is the award to *victims* of constructive seniority, an approach rejected by the court of appeals with the candid explanation that junior black and Hispanic Group C appointees benefited by the August 7, 1981 order were not victims of the practices condemned in 1974. They could be eligible for no seniority placement other than date of permanent appointment as Mass. Gen. Laws, Chap. 31, § 33 entitled them.

The junior Group C appointees are in no different status than non-victim class members in any other employment discrimination suit. They should not be entitled to any greater competitive edge.

Franks v. *Bowman*, 424 U.S. 747, 756 (1976) acknowledges the propriety of awards of competitive seniority inserting victims in their rightful places in the seniority hierarchy. Only identified victims are so entitled; and class members, if they are not actual victims, must be denied that competitive advantage. *Id.*, at 764, N. 41; 772-3. Actual victim status is prerequisite to relief disadvantaging other employees. *Team-*

sters v. *United States*, 431 U.S. at 365-372. *Accord*, *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. ____ (1982); 50 U.S.L.W. 4238, 4242 (February 24, 1982).

The seniority suppression and senior employee layoffs here are precisely the conditions censured by this court in *Ford Motor Co.* v. *Equal Employment Opportunity Commission*, 50 U.S.L.W. 4937, 4942 (June 29, 1982):

> As we have acknowledged on numerous occasions, seniority plays a central role in allocating benefits and burdens among employees. In light of the "overriding importance" of these rights, *American Tobacco Co.* v. *Patterson*, 456 U.S. ____, ____ (1982) (quoting *Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964)), we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination.
>
> The sacrifice demanded by the lower court's rule moreover leaves the displaced workers without any remedy against claimants who fail to establish their claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that the "large objectives" of Title VII, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) (citation omitted) require innocent employees to carry such a heavy burden. (notes omitted).

The order here contested "compell[ed] innocent workers to sacrifice their seniority" to persons who could not validly assert any claim entitling them constructive seniority. The hard fact is that the senior workers were "relegated to the

unemployment lines" only because they were not members of a preferred racial/ethnic category.

Ford Motor Co. v. *E.E.O.C.*, *id.* at 4943, confirms the consideration due to the rights of innocent third parties: "The rule, moreover, threatens the interests of other innocent employees by disrupting the established seniority hierarchy, with the attendant risk that an innocent employee will be unfairly laid off or disadvantaged because a Title VII claimant unfairly has been granted seniority." The order in this case so subjugated the interests of senior innocent employees who found themselves on the street because of its terms.

The court of appeals denies that its opinion involves seniority, putting the issue thus at App. 20, 1:

> This case does not involve an award of constructive seniority to individuals who have been discriminated against; the orders require that there be a certain percentage of minorities on the Police and Fire Departments without regard to whether the individuals compromising the minority percentage were the actual victims of past discrimination.

The denial in the first clause is a fiction. The order here conferred superseniority. The premises of the second clause —the irrelevancy of victim status and authority to mandate desirable population ratios—conflict in principle with, and are contrary to the holdings of, decisions of this court. The first premise that victim status is irrelevant is at fundamental odds with *American Tobacco Co.* v. *Patterson*, 50 U.S.L.W. 4364; *Pullman-Standard Division of Pullman, Inc.* v. *Swint*, 50 U.S.L.W. 4425; *Ford Motor Co.* v. *EEOC*, 50 U.S.L.W. 4937; *Teamsters* v. *United States*, 431 U.S. at 365-372 and *Franks* v. *Bowman Transportation Co.*, 424 U.S. at 764; 772-3.

The second premise that specific racial and ethnic percentages can be required ignores the plain terms of § 706(j) deny-

ing any requirement that the racial composition of any work force mirror a general population. *United Steelworkers* v. *Webber*, 443 U.S. 193, 206 (1979) and *Teamsters* v. *United States*, 431 U.S. at 339 n.20.

The authorities cited already are Title VII cases and this litigation also proceeds under 42 U.S.C. §§ 1981 and 1983. No decision of this court addresses the relationships between sections 703(h) or 703(j) and section 1981 explicitly. The disputed order, however, cannot rest on 42 U.S.C. § 1981.

Despite the suggestions of the court of appeals that its earlier decision, 504 F.2d 1017 (CA 1 1974), *cert. denied*, 421 U.S. 910 (1975), might not have been different had it been decided under *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) and *Washington* v. *Davis*, 426 U.S. 229 (1976), the district court never made any findings of purposeful discrimination. The 1969-1971 entrance examinations were faulted because of disparate, non-job related impact on plaintiff's class. 371 F. Supp. at 507, 517, 521. The recruitment violation was an unintended one. *Id.*, at 519. Hence, absent "purposeful discrimination," neither the examinations nor the recruitment technique could violate section 1981. *General Building Contractors Association, Inc.* v. *Pennsylvania*, ____ U.S. ____, 50 U.S.L.W. 4975 (June 29, 1982). Surely, judgment did enter in 1974 and plaintiffs do not need to reestablish liability. The point is that the liability is established under Title VII only and the plaintiff class is entitled only to Title VII's remedies.

It is anomalous and even absurd to suggest that section 1981 can justify this extraordinary seniority suppression when it could not be countenanced under Title VII. *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 583 n.24 (1979), implies that section 1981 confers no greater entitlements than does Title VII and *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459 (1975), describes the remedies under both

statutes as coextensive. This coextension of remedies is required by 42 U.S.C. § 1988 which directs that "...jurisdiction (in section 1981 litigation) ... shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect ..." *Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471, 474-5 (CA 4 1978), *cert. denied*, 440 U.S. 979 (1979) [section 1988 through § 706(h), protects seniority systems], *accord*, *Chance* v. *Board of Examiners & Board of Education*, 534 F.2d at 998 and *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d at 1320 n.4.

The order is also inconsistent with other decisions of this court bearing on affirmative action programs. The district court entered its order after seniority based layoffs had occurred and compliance demanded rehiring junior black and Hispanic firefighters and corresponding firings of senior nonminority employees. Discharge of white employees on that ground violates § 703(a)(1) of Title VII and 42 U.S.C. § 1981, *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280, 287-8 (1976). *McDonald*, *id.*, at n.8 reserved the question of permissible affirmative action programs "... judicially required or otherwise." *United Steelworkers* v. *Webber*, 443 U.S. 193 (1979) answers the reserved question as to one permissible voluntary affirmative action program. While approving the collectively bargained plan then before this Court, *Webber* also cautions that an affirmative action justification will not vindicate every method used for that end. There is ... "a line of demarcation between permissible and impermissible affirmative action plans," 443 U.S. at 208. Some of that line's bounds are sketched: the program cannot "trammel" the interests of white employees; its purpose cannot be secured by discharges of white workers; and its design cannot perpetuate racial percentages. The August 7, 1981 order trespasses into the impermissible by insisting on the

discharges of white workers to maintain a specified racial and ethnic profile in Boston's Fire Department. *McDonald, supra*, in conjunction with *Webber, supra* implies the conclusion that the order violated the Title VII and Section 1981 rights of a substantial number of white firefighters who would have remained employed save for the rigid demands of that order.

Ultimately, there is an issue of constitutional dimension. Can a person be divested of his occupation because he is not a member of a preferred racial or ethnic category? *University of California Regents* v. *Bakke*, 438 U.S. 265, 307 (1978), warns that such a result is constitutionally forbidden. *Accord, DeFunis* v. *Odegaard*, 416 U.S. 312, 341-2 (1974) (Douglas, J., dissenting). Here the error of the court below can be corrected without the need for a constitutional adjudication by this court for the reasons already argued. If those arguments are insufficient, the constitutional issue presented in *Bakke, supra* and *DeFunis, supra* can be settled definitively on the record here if that need occurs.

III. This Decision Is Not Moot.

The recent 1982 recalls do not call for denial of the writ. Senior non-minority firefighters have appeals pending before the Massachusetts Civil Service Commission seeking full relief for violation of their seniority rights including back pay orders and service credit restoration that the Commission is prevented from resolving by the terms of the August 7, 1981 order. While the omnibus state legislation just enacted provides that the firefighters terminated during the 1981 layoffs can never be laid off again for fiscal reasons (but not for technological or tactical change reasons), the underlying dispute as to the validity of this order continues and its resolution affects their interests and interests common to other firefight-

ers represented by Local 718 and it can recur. There is still substantial interest and injury to warrant the relief. *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 123 (1974).

Conclusion.

This decision conflicts with decisions of other circuits and is inconsistent directly and in principle with decisions of this court. The decision raises sensitive and important federal law issues that should be settled by this court.

For these reasons, this petition for writ of certiorari to the United States Court of Appeals should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

Nos. 81-1642
81-1656
81-1650
81-1651

BOSTON CHAPTER, NAACP, ET AL.,

PLAINTIFFS-APPELLEES,

v.

NANCY B. BEECHER, ET AL.,

DEFENDANTS-APPELLANTS,

and

BOSTON FIREFIGHTERS UNION, LOCAL 718,

INTERVENOR-APPELLANT.

PEDRO CASTRO, ET AL.,

PLAINTIFFS-APPELLEES,

v.

NANCY BEECHER, ET AL.,

DEFENDANTS-APPELLANTS,

and

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,

INTERVENOR-APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FROM THE DISTRICT OF MASSACHUSETTS

[HON. ANDREW A. CAFFREY, *U.S. District Judge*]
(522 F. Supp. 873)

Before
CAMPBELL, BOWNES and BREYER,
Circuit Judges.

E. David Wanger, with whom *John F. McMahon*, and *Angoff, Goldman, Manning, Pyle & Wanger, P.C.* were on brief, for Intervenor, Appellant Local 718 in Case No. 81-1642.

Frank J. McGee, on brief for Intervenor-Appellant Boston Police Patrolmen's Association, Inc.

Thomas A. Barnico, Assistant Attorney General, Government Bureau, Department of the Attorney General, with whom *Francis X. Bellotti*, Attorney General, was on brief, for the State Defendants-Appellants in Case No. 81-1651.

Marc S. Seigle, Special Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, was on brief, for the State Defendants-Appellants in Case No. 81-1656.

James S. Dittmar, with whom *Berman, Dittmar & Engel, P.C.*, *Judith Bernstein Tracy*, and *Peggy A. Wiesenberg* were on brief, for plaintiffs-appellees.

May 11, 1982

BOWNES, *Circuit Judge*. This case arises from a conflict between a statutorily established seniority system mandating layoffs on a last hired, first fired basis and court orders insulating a percentage of minorities from such system. Shortly after the July 1981 beginning of fiscal 1982, the Police and Fire Department of the City of Boston embarked upon a program of massive reductions in force, allegedly precipitated by budgetary restrictions imposed by "Proposition 2 1/2." During the six-year period prior to the commencement of the layoffs, both departments had been steadily increasing the percentage of their black and hispanic members pursuant to consent decrees designed to remedy the present and continuing effects of past racial discrimination. The consent decrees were silent as to layoffs. If this reduction in force were conducted according to strict seniority as prescribed by Massachusetts law,[1] roughly half of the blacks and hispanics hired would be laid off. To prevent this substantial undoing of the progress made in integrating blacks and hispanics into the police and fire departments, the district court granted plaintiffs' motions in these four consolidated cases to modify the prior consent decrees by pro-

[1] Mass. Gen. Laws Ann. ch. 31, § 5.

hibiting both departments from reducing the percentage of blacks and hispanics in their respective work forces below the level obtaining at the commencement of the force-reduction program. Defendant Massachusetts Civil Service Commission (the Commission) and intervenors Boston Firefighters Union, Local 718, and Boston Police Patrolmen's Association, Inc., have appealed.

There are three fundamental issues: did the district court have the power to modify the consent decrees and, if so, did its orders impermissibly supersede a valid Massachusetts civil service statute or unconstitutionally impose reverse discrimination.

In order to understand the issues and to analyze properly the district court's modification of the consent decrees, it is necessary to begin by tracing the prior proceedings.[2]

The Police Case

Plaintiffs, unsuccessful black and hispanic candidates for appointment as Boston police officers, commenced the police action in 1970. They claimed racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983 in connection with the recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented, through appointment procedures, by the Boston Police

[2] We refer throughout this opinion to *Castro et al.* v. *Beecher et al.*, and related proceedings as the "police case." The police case is reported at 334 F. Supp. 930 (D. Mass. 1971); 459 F.2d 725 (1st Cir. 1972); 365 F. Supp. 655 (D. Mass. 1973); 386 F. Supp. 1281 (D. Mass. 1975). Similarly, we refer to *Boston Chapter, NAACP, Inc., et al.* v. *Beecher, et al.*, and related proceedings as the "fire case." The fire case is reported at 371 F. Supp. 507 (D. Mass. 1974); 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); 423 F. Supp. 696 (D. Mass. 1976). Both the police and fire cases were reported most recently in Chief Judge Caffrey's consolidated opinion, 522 F. Supp. 873 (D. Mass. 1981), from which this appeal arises.

Department as well as other appointing authorities,[3] including other Massachusetts cities and towns and various state agencies. *Castro et al.* v. *Beecher et al.*, 334 F. Supp. 930, 934 (D. Mass. 1971) (Wyzanski, J.).

Following trial, the district court made extensive findings, including findings that in 1970, blacks represented 16.3 percent of the population of Boston but only 3.6 percent of its police force. The district court also found that the 1968-1970 Massachusetts Civil Service Police Entrance Examinations were not job related and discriminated against minorities, including plaintiffs, who did not share "prevailing white culture." *Id.* at 943. It enjoined the Commission from issuing further certifications based on these examinations.

We held on appeal that the examinations were racially discriminatory, and remanded the case with instructions that the district court enter a remedial order requiring a non-discriminatory, job-related examination and providing for certification of black and hispanic applicants on a priority basis, to be determined in accordance with guidelines that we set forth. *Castro et al.* v. *Beecher et al.*, 459 F.2d 725, 730-31, 737-38 (1st Cir. 1972). We noted that the prescribed remedy "will yield a significant increment of black and Spanish-surnamed police officers in the near term" and insisted that relief fashioned by the district court "is to be more than token." *Id.* at 737.

On remand, after observing that unlike most consent decrees, this one had been preceded by full hearings, findings of fact, conclusions of law and several opinions both of the district and appellate courts, the district court approved a comprehensive consent decree, finding that it was "just, reasonable, and in the public interest, and more likely than any other proposed solution to give the people of the Commonwealth of Massachusetts effective, non-discriminatory, dedicated, and honorable police forces . . . ." 365 F. Supp.

[3] Among the named defendants were the Metropolitan District Commission, the Massachusetts Bay Transportation Authority, and the Capitol Police. 334 F. Supp. at 934.

655, 660 (D. Mass. 1973). The decree provided, among other measures, for the creation of civil service certification priority pools, consisting of black and hispanic applicants, and for the implementation of affirmative recruitments programs aimed at this group. *Id.* at 660-62.

In 1975 plaintiffs instituted another action under the All Writs Act, 28 U.S.C. § 1651, seeking to clarify and preserve the effect of the district court's decree in light of litigation that had taken place in Massachusetts courts relating to the rights of cities and towns to grant statutory preferences to residents and veterans in appointing police officers. The court (Caffrey, C.J.) held that the prior decree did not displace these statutory preferences except insofar as the preferences must be applied within the several groups of applicants established by the decree. 386 F. Supp. 1281, 1285 (D. Mass. 1975). It urged that the parties agree upon a substitute consent decree and recommended they follow the one adopted in the fire case, *Boston Chapter, NAACP, Inc.* v. *Beecher et al.*, 371 F. Supp. 507 (D. Mass. 1974), *aff'd*, 504 F.2d 1017 (1st Cir.), *cert. denied*, 421 U.S. 910 (1975). *Id.* at 1286.[4]

Thereafter the parties entered into a further consent decree, which the district court approved on July 7, 1975.

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[4] The consent decree finally agreed upon in the police case directed that four groups of eligible police officer candidates be established for each requisitioning police department:

> Group A consisted of minority applicants who failed discriminatory police entrance exams administered between 1968-1970 but who passed the 1972 interim exam and were otherwise qualified;
>
> Group B consisted of persons on three eligibility lists established in 1970-1971;
>
> Group C consisted of minority candidates not in Group A who passed the 1972 interim examination and were otherwise qualified;
>
> Group D consisted of all other persons who passed the 1972 interim exam and were otherwise qualified.

The consent decree in the fire case contained essentially identical groups of candidates, except it stated that the discriminatory exams targeted by the priority pools were administered from August 1968 to August 1971.

This decree mandated, among other things, certification of police applicants by methods essentially designed to facilitate the appointment in Boston and Springfield of one minority police officer for each white officer, and to expedite minority appointments by other appointing authorities on a ratio of one to three. The decree provided that these remedial measures should apply to any city or town with a minority population of one percent or more until the police force of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community," at which time further certification would be made according to existing Massachusetts law.[5] The same parity target had already been set in the fire case.

On July 13, 1976, and on June 1, 1979, the district court approved and entered supplemental consent decrees that provided, among other measures, for continuation of the consent decree's method and ratios for certification, for further affirmative recruitment activities, and for monitoring of the civil service examination. They also discharged from further judicial supervision the police departments of cities and towns that had attained the parity target according to then current census statistics.

In the spring of 1981, the Boston Police Department initiated the reduction in force program. Thereafter, on April 6, 1981, plaintiffs filed a motion pursuant to Federal Rule Civil Procedure 60(b) to modify prior remedial orders. Following state funding legislation that led to a rescinding of the layoff program for fiscal 1981, plaintiffs requested that the court continue their motion until the program was reinstituted. In the first week of July 1981 the police department reactivated the layoff program, and on July 30, 1981, the district court (Caffrey, C.J.) heard plaintiffs' motion together with a similar motion in the fire case. On August 7, 1981, the opinion and order issued enjoining the Boston

[5] This parity target also applied to the state agencies enumerated in note 3 *supra*, relative to the percentage of minorities in the communities served by those agencies.

Police Department and Fire Department from reducing the percentage of minority officers below the level existing at the commencement of the layoff program.

The Fire Case

Unsuccessful black and hispanic applicants for appointment as City of Boston fire fighters and the Boston Chapter of the NAACP commenced the fire case in 1972. As in the police case, the plaintiffs claimed racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983 in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented, through appointing procedures, by the Boston Fire Department as well as by other appointing authorities.

In 1973 the Attorney General of the United States brought an action raising similar claims, together with Title VII claims, 42 U.S.C. § 2000e *et seq.*, and the two actions were consolidated.

Following hearings, the district court made extensive findings, including findings that blacks represented approximately 16 percent of Boston's population, that the combined minority population was 23 percent of the total, and that blacks and hispanics represented only 0.9 percent of the fire department's sworn personnel. *Boston Chapter, NAACP, Inc.* v. *Beecher et al.*, 371 F. Supp. at 514 (Freedman, J.). The court treated the hearings on plaintiffs' challenge to the fire fighters' entrance examination as a trial on the merits pursuant to Federal Rule Civil Procedure 65(a)(2) and found that plaintiffs had established an unrebutted case of racial discrimination. The court found, as evidenced by the "insignificant" number of blacks and hispanics certified, that the examinations administered from 1968 through August 1971 were discriminatory. It also found that the word-of-

mouth recruitment policy resulted in racial discrimination, albeit unintentional. *Id.* at 510, 517 & 519-20.[6]

To afford "affirmative relief to remedy the present effects of past discrimination," the district court ordered a program of active recruitment of minority fire fighters, enjoined further certification based upon the results of the discriminatory examinations, ordered development of a job-related examination, and required establishment of priority certification groups for black and hispanic applicants. *Id.* at 520-23. It ordered that the remedial measures mandated by its decree remain in force for any city or town with a minority population greater than one per cent until the fire department of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community" at which time "certifications will be made according to existing Massachusetts law." *Id.* at 523.

We affirmed, holding that plaintiffs had demonstrated that the Massachusetts civil service test had a disproportionate impact on minority hiring and that defendants had not demonstrated job relatedness. *Boston Chapter, NAACP, Inc.* v. *Beecher et al.*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). *See also Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Regarding the subject of an appropriate remedy, we noted that in the police case we had required the district court to institute remedial measures "as a means of ameliorating the continuing effects of past discrimination . . . ." *Id.* at 1026. We approved the district court's decree, including the provision that the decree would remain in effect until any particular fire department attains "sufficient minority fire fighters to have a percentage on the force approximately equal to the percentage of minorities in the lo-

[6] The district court concluded that defendants had not rebutted plaintiffs' prima facie case of discrimination established by the statistical disparity between the percentage of minority fire fighters in various fire departments and the relevant local population; it found that the entrance exams were not job related. *Boston Chapter, NAACP, Inc.* v. *Beecher et al.*, 371 F. Supp. 507, 517 (D. Mass. 1974), citing *Castro et al.* v. *Beecher et al.*, 459 F.2d 725, 732 (1st Cir. 1972).

cality." *Id.* at 1027. We reasoned that the district court's color-conscious relief did not violate the Constitution because it "goes no further than to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities," *id.*, and that "our society [is] well served by taking into account color in the fashion used and carefully limited in extent and duration . . . ." *Id.* We also rejected defendants' contention that the relief was barred by section 703(j)[7] of Title VII, 42 U.S.C. § 2000e-2(j). *Id.* at 1027-28.

Since the 1974 decree, the district court has entered several interim consent decrees and stipulations to effectuate its original order. These subsequent orders have set procedures for administration of new examinations, establishment of eligibility lists, affirmative recruitment, and notice and reporting.

On April 7, 1981, upon commencement by the City of Boston of its force-reduction program, plaintiffs filed a motion to modify prior remedial orders. As in the police case, proceedings were continued until the consolidated hearing on

[7] Section 703(j) of Title VII provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j).

July 30, 1981. The injunction covering both departments issued on August 7.

The Facts

The statistics are undisputed. At the time of the original filing of these actions, racial discrimination had led to the virtual exclusion of blacks and hispanics from Boston's Police and Fire Departments. In 1970, only 65 of 2,805 police officers were black or hispanic, representing but 2.3 percent of the total. 459 F.2d at 728 n.1, 730. As of 1974, only 18 of 1,983 fire fighters were black or hispanic, representing only 0.9 percent of the total. 371 F. Supp. at 514. In contrast, the minority population of Boston was more than 16 percent in 1970, 459 F.2d at 728, and approximately 23 percent by 1974. 504 F.2d at 1020 n.4.

The district court's remedial orders in both cases have produced marked progress eliminating the present and continuing effects of past discrimination. Between 1974 and 1980, the Boston Police Department hired 492 officers, of whom 213 (43 percent) were black or hispanic. As of July 6, 1981, 224 out of a total of 1,912 officers were black or hispanic; minority representation had risen to 11.7 percent. Between 1974 and 1980, the Boston Fire Department hired 553 fire fighters, of whom 248 (45 percent) were black or hispanic. On July 6, 1981, 248 out of a total of 1,690 fire fighters were black or hispanic; minority representation had increased in this department to 14.7 percent.

By 1980, however, the black and hispanic population of Boston had risen to between 29 and 30 percent, almost double the percentage of ten years prior.

Early in July 1981 both the Police and Fire Departments of the City of Boston commenced a systematic program of reduction in force. The city's program proposed six weekly layoffs, running from early July to mid-August. The police and fire departments planned to make these layoffs pursuant to the Massachusetts civil service statute, which requires

separations from service in reverse order of seniority. Mass. Gen. Laws Ann. ch. 31, § 39.

Such a layoff program was certain to cause a devastating reduction in the number of black and hispanic officers on both forces. The police department planned to lay off 252 officers, of whom 122 were black or hispanic. Of the officers to be laid off, 48 percent were minority,[8] which comprised 54.5 percent of the department's entire complement of minority officers. The fire department planned to lay off 207 officers, of whom 113 (54.6 percent) were black or hispanic; this constituted 45.6 percent of all minorities on the force. Unbridled operation of the force-reduction program would have dramatically cut minority representation in both the police and fire departments. By mid-August 1981 only 103 of 1,660 police officers would have been black or hispanic, and minority representation would have fallen from 11.7 percent to 6.2 percent. By mid-August only 135 of 1,483 fire fighters would have been black or hispanic, and minority representation in that department would have dropped from 14.7 percent to 9.1 percent.

Moreover, although as of July 30, 1981, city officials intended to proceed with only six waves of layoffs, there was no certainty that further force reductions would not occur.

The Decision Below

In its August 7, 1981 consolidated opinion, the district court made the specific findings outlined above. It then found, on the basis of the entire record in both cases, that "the massive firings claimed by municipal authorities to be the result of the voters enacting Proposition 2 1/2 amount to

[8] The Supreme Court has approved of racial preferences granted to "minority" groups of divergent composition. *Compare United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979) (blacks only) *with Fullilove, et al.* v. *Klutznick, Sec. of Commerce, et al.*, 448 U.S. 448 (1980) (Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts). Throughout this opinion, our references to "minority" group members pertain to blacks and hispanics only. Whether a particular individual qualifies as a "minority" group member entitled to relief according to this definition has not been raised by the parties and we proffer no opinion on that question.

'new and unforeseen conditions' . . . ." *Castro et al.* v. *Beecher et al.*, 522 F. Supp. at 877. It ruled that, in light of the remedial objective of both consent decrees,

> namely bringing minority representation up to a level approximating the percentage of the total population which the minorities represent in the community, . . . if anything similar to Proposition 2 1/2 had been in effect at the time that the remedial decrees were entered, these decrees would have been fashioned to make allowances for terminations so that the minority representation on both departments could have been maintained if not increased notwithstanding the then hypothetically ongoing terminations.

Id.

The court also concluded that the denial of the relief sought would reverse the results of the court's prior remedies, would "allow the substantial eradication of all progress made by blacks and hispanics" in securing positions as police officers and fire fighters, and would produce a "grievous wrong." *Id.* Accordingly, the Boston Police Commissioner and Fire Commissioner were enjoined from reducing, "pursuant to any departmental or city program of reduction in force on account of lack of funds or abolition of position," the percentage of minority officers below that obtaining at the commencement of the program. *Id.* at 877-78. Neither the Police Commission nor the Fire Commisioner has appealed.

I. *THE COURT'S POWER TO REVISE THE CONSENT DECREE*

We initially determine whether the district court was empowered to modify its prior remedial orders because of the impending layoffs. At the outset we note that defendants settled both the police case, filed originally under sections 1981 and 1983, and the fire case, commenced under these sections as well as Title VII, by entering into remedial consent

decrees. They did so only after the liability issues had been extensively litigated, resulting in well-supported determinations at the district and circuit levels (with certiorari having been sought and denied in the fire case), that defendant's certification and recruiting procedures were discriminatory because they had produced an underrepresentation of blacks and hispanics in the police and fire departments, and that these procedures lacked justification in terms of job-relatedness. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424.

The first question is whether *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), bar the relief ordered because intentional discrimination was not proved. We find no bar. It is by no means clear that our decisions in the police and fire cases should have been different had they been decided after *Washington* v. *Davis* and *Arlington Heights*, but in any event the pattern of relief which the present modifications in the decrees seek to preserve was conclusively established prior to those decisions. Neither case stands in the way of the district court's modification of the consent decree. *Sarabia* v. *Toledo Police Patrolman's Ass'n*, 601 F.2d 914, 919 (6th Cir. 1979); *Bolder* v. *Penn. State Police*, 73 F.R.D. 370, 371-72 (E.D. Pa. 1976).

We have carefully reviewed the original complaints, the language contained in the decrees, and all district and circuit court opinions in these cases. We can only conclude that the purpose of the decrees and the intervening orders was to eliminate the present and continuing effects of defendants' past discrimination. We reject appellants' contention that the original decrees and subsequent modifications limit relief to correcting features of the certification process found to have violated plaintiffs' constitutional rights as to hiring. These cases encompass the overall issue of shaping ongoing relief so as to eliminate the *condition* precipitating the original decrees: gross discriminatory underrepresentation of persons in the fire and police departments who are not members

of the "prevailing white culture."[9] *Castro* v. *Beecher*, 459 F.2d 725, 729-31 (1st Cir. 1972); *see Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974); *Swann* v. *Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *cf. Evans* v. *Buchanan*, 582 F.2d 750, 768 (3d Cir. 1978) (in banc), *cert. denied*, 446 U.S. 923, *reh'g denied*, 447 U.S. 916 (1980).

The district court based its authority to reshape the consent decrees on its finding that the dramatic reduction in minority representation in these departments constituted a showing of a "grievous wrong evoked by new and unforeseen conditions," citing the Supreme Court in *United States* v. *Swift*, 286 U.S. 106, 119 (1932). *Swift* involved an antitrust *defendant* that sought to avoid its obligations pursuant to a consent decree due to changed market conditions. Perhaps a more apt standard was set out by the Supreme Court in *United States* v. *United Shoe Corp.*, 391 U.S. 244 (1968), wherein *plaintiffs* in an antitrust dispute sought revision of their remedy designed to produce "workable competition." *Id.* at 249. There, the Court held that modification was appropriate because time and experience had demonstrated that the decree had failed to accomplish its intended result. *Id. See also System Federation* v. *Wright*, 364 U.S. 642, 647 (1961). In any event there can be no question of the power of a court of equity, upon a sufficient showing, "to modify an injunction in adaptation to changed conditions though it was entered by consent." *United States* v. *Swift*, 286 U.S. at 114. Here, there was ample showing that changed circumstances would totally vitiate the intended effect of the original decrees unless the proposed modifications were made.

Nor do we think that plaintiffs should be penalized for failing, in negotiating the decrees, to have foreseen the un

[9] Prior orders and stipulations in both cases have dealt with matters going beyond civil service certification measures, including employment of provisional employees, recruiting, appointment targets, rejection of applicants, the effects of statutory preferences for veterans and local residents, mental and physical testing, and firing. *See, e.g.*, 371 F. Supp. at 521-22; 365 F. Supp. at 661-62.

precedented change in state and local fiscal policy resulting in the extensive layoff programs. We agree with the district court that, had the parties anticipated any measure such as Proposition 2 1/2, they would have incorporated some provision addressing its potential impact into the decrees. Failure to take the action here challenged would result in undoing most all that had been accomplished by the original decrees.

The Sixth Circuit's treatment of a virtually identical layoff situation in *Brown* v. *Neeb*, 644 F.2d 551 (6th Cir. 1981), lends considerable support to our conclusion that modification was within the court's power. In *Brown*, findings of prior illegal discrimination by the Toledo Fire Department formed the predicate of a consent decree entered into by the city, which set as a goal that the city "achieve within 5 years a fire department which reflected the racial composition of the city as a whole." *Id.* at 555. The Sixth Circuit upheld the district court's authority to order the same type of modification of the original decree as in this case, reasoning that the language in the decree, although silent as to the effect of layoffs, and the circumstances surrounding the entry of the decree, compelled the conclusion that the "city agreed that it had a constitutional duty to eliminate discrimination in the hiring of firefighters." *Id.* at 562-63. The *Brown* court distinguished its denial of similar relief in *Youngblood* v. *Dalzell*, 568 F.2d 506 (6th Cir. 1978), because in *Youngblood*, unlike *Brown*, there had been no finding of prior discrimination; the original decree contained language expressly denying that the Cincinnati Fire Department had discriminated in its past hiring practices. *Brown* v. *Neeb*, 644 F.2d at 561 & n.18.

Here, as in *Brown*, the defendants entered into consent decrees upon "capitulating to judicial findings of past discrimination." *Brown* v. *Neeb*, 644 F.2d at 562 & n.20; *Boston Chapter, NAACP, Inc.* v. *Beecher*, April 17, 1975 Interim Consent Decree (fire case), App. at 90-91; *Castro* v. *Beecher*, 365 F. Supp. at 656. Both decrees contain language

that warrants concluding that the certifying and appointing authorities are under an affirmative duty to integrate the police and fire departments until the percentage of blacks and hispanics in both departments approximates that of the general population.[10] In addition, neither decree contains any exculpatory language as in *Youngblood.* And, as in *Brown,* if the district court undertook no modification, the layoffs would have eroded significantly, if not completely destroyed, the affirmative action progress made to date. *See Brown* v. *Neeb,* 644 F.2d at 560. Under these circumstances, we conclude that the district court had the authority to modify the consent decrees in the light of new and unforeseen conditions.

We next address the issues of whether the relief ordered was proper and constitutional.

II. *THE COURT ORDER VERSUS THE MASSACHUSETTS SENIORITY STATUTE*

To implement its order prohibiting the Boston Police and Fire Departments from reducing the current level of minority representation, the district court required the maintenance of separate minority and nonminority lists with respect to seniority, reemployment and reinstatement. To this extent, therefore, the district court's order superseded the operation of the reverse seniority layoff provisions of the Massachusetts civil service statute, Mass. Gen. Laws Ann. ch. 31, § 39.[11] Most of the cases dealing with the inherent con-

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[10] *See, e.g.,* June 27, 1975 Consent Decree (police case), App. at 122-23; April 17, 1975 Interim Consent Decree (fire case), App. at 93.

[11] Mass. Gen. Laws Ann. ch. 31, § 39 provides in pertinent part:

> If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of serv-

flict between affirmative action programs and vested seniority rights have concerned private employers and Title VII. And, until recently, the dispute has mainly centered on hiring and promotion.

There are three Supreme Court cases that focus on the problem of seniority rights and discrimination against minorities. *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976); *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324 (1977), and *American Tobacco Co., et al.* v. *Patterson, et al.*, 50 U.S.L.W. 4364 (April 5, 1982). In *Franks* the district court had found that the employer had discriminated in making hiring, transfer, and discharge decisions, all of which occurred after July 2, 1965, the date on which the prohibition against racial discrimination under Title VII took effect as to private employers. *Franks* v. *Bowman Transp. Co.*, 424 U.S. at 751, 758 n.10. The Supreme Court held that section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h)[12] did not "modify or restrict relief other-

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ice, computed in accordance with section thirty-three, shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the five-year period following the date of such separation.

[12] Relevant portions of § 703(h) of Title VII provide:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(h).

wise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved," *id.* at 761-62, and "that class-based seniority relief for identifiable victims of illegal hiring discrimination was a form of relief generally appropriate under § 706(g)." *Id.* at 779; *accord, Teamsters* v. *United States,* 431 U.S. at 346-48; *EEOC* v. *American Tel. & Tel. Co.,* 556 F.2d 167, 174 (3d Cir. 1977), *cert. denied,* 438 U.S. 915 (1978); *see Ass'n Against Discrimination* v. *City of Bridgeport,* 647 F.2d 256, 278 (2d Cir.), *cert. denied,* 102 S. Ct. 397 (1981); *Guardian's Ass'n of New York City* v. *Civil Service,* 633 F.2d 232, 249-54 (2d Cir. 1980), *cert. denied,* 101 S. Ct. 3083 (1981); *Chance* v. *Board of Examiners & Bd. of Educ.,* 534 F.2d 993, 1007 (2d Cir. 1976) (*reh'g in banc*), *cert. denied,* 431 U.S. 965 (1977).

In *Teamsters* the Court did not retreat from the rule set forth in *Franks,* but dealt instead with the effect of section 703(h) on awarding retroactive seniority to redress prior discrimination that had occurred both before and after the effective date of Title VII. The district court in *Teamsters* had found that the employer had discriminated by implementing hiring, assignment and promotion policies that caused black and hispanic employees to occupy the lower paying and less desirable jobs. 431 U.S. at 329-31. As to those plaintiffs claiming that they had been discriminated against after the effective date of Title VII, the Court stood firm on its *Franks* ruling. *Id.* at 347. But the Court denied relief to those plaintiffs alleging discrimination that occurred prior to the effective date of the Act and held that an "otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." *Id.* at 353-54.

The most recent case, *American Tobacco Co.* v. *Patterson,* 50 U.S.L.W. 4364, dealt with the question whether § 703(h) applied to seniority systems adopted after the effective date of Title VII, July 2, 1965. After an exegesis of the statutory history of Title VII, the Court concluded that § 703(h) im-

munizes a bona fide seniority system whenever adopted unless intentional discrimination was proven. *Id.* at 4367-68. Compare p. 13 *American Tobacco Co.* did not explicitly overrule the holding of *Franks* that § 703(h) does not bar appropriate relief if an illegal discriminatory practice occurring after the effective date of the Act is proved.

We find nothing in this trilogy that precludes a court from ordering relief to remedy discrimination that exists apart from the adoption or application of a bona fide seniority system. The original consent decrees in the cases before us, decided long before the Supreme Court cases, were directed at such independent violations, the use of discriminatory certification examinations. None of the Supreme Court cases apply to the basic issue at stake here; the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs. To hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted.

Two recent Second Circuit cases are analogous to our situation. *Guardians Ass'n* v. *Civil Service,* 633 F.2d 232 (2d Cir. 1980), *cert. denied,* 101 S. Ct. 3083 (1981), was an action brought under Title VII, Title VI and 42 U.S.C. § 1981 by black and hispanic members of the New York City Police Department, alleging that layoffs carried out pursuant to a last hired, first fired plan were discriminatory because the Department's entry examinations administered during the years 1968 to 1970 were discriminatory, and that but for such discrimination plaintiffs would have been hired earlier and thus would have accrued sufficient seniority to withstand being fired. The court upheld the district court's findings that the entry examinations were discriminatory and held that the use of such tests as late as 1974 violated Title VII. It held that § 703(h) did not "immunize post-Act hiring on the basis of an eligibility list reflecting performance on pre-Act discriminatory examinations." *Id.* at 253. In *Association Against Discrimination* v. *City of Bridgeport,* 647 F.2d 256 (2d Cir. 1981), *cert. denied,* 50 U.S.L.W. 3695 (March 3, 1982)

(Nos. 81-373, 81-374), the Second Circuit affirmed its holding in *Guardians* that a municipality could be held liable under Title VII for post-Act hiring based on a pre-Act discriminatory hiring list. *Id.* at 272-74.

It is now settled that remedies to right the wrong of past discrimination may suspend valid state laws. *Carter* v. *Gallagher*, 452 F.2d 315, 328 (8th Cir. 1961) (*reh'g in banc*), *cert. denied*, 406 U.S. 950 (1972); *United States* v. *Mississippi*, 339 F.2d 679 (5th Cir. 1964); *United States* v. *Duke*, 332 F.2d 759 (5th Cir. 1963). *See generally* Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv. L. Rev. 1544, 1557-60 (1975).

We emphasize that the district court orders do not completely nullify the seniority statute. Nor do they mandate the firing of any particular employees. The orders allow the statute to be followed so long as the level of minority representation is not reduced beyond that which prevailed at the time the personnel reductions began. The order was designed to operate within the framework of the statute, although modifying it to the extent necessary to preserve the integration already achieved.

We hold that the court's orders prevail over the Massachusetts seniority statute.

III. *THE CONSTITUTIONALITY OF THE ORDERS*

Appellants argue that the orders discriminate against nonminorities and thus are unconstitutional.[13] We first define the issue. This case does not involve an award of constructive seniority to individuals who have been discriminated against; the orders require that there be a certain percentage of minorities on the Police and Fire Departments without

[13] As a threshold matter, we find that appellants did preserve the reverse discrimination argument for appeal by suggesting the applicability of the reasoning in *Chance* v. *Board of Examiners & Bd. of Educ.*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977), at the July 30, 1981 hearing before Judge Caffrey.

regard to whether the individuals comprising the minority percentage were the actual victims of past discrimination.

We turn to the Supreme Court cases, in addition to those already discussed, bearing on the issue. The first case is *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286-87 (1976), which held that section 1981 protects whites as well as blacks from racial discrimination in private employment.

Next came *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978). A divided court upheld so much of the judgment of the Supreme Court of California declaring the University's special admission program based on racial quotas unlawful. *Id.* at 270-71. It reversed, however, that portion of the California court's judgment enjoining the University from according any consideration to race in its admission process. *Id.* at 272.

United Steelworkers of America v. *Weber*, *443 U.S. 193, reh'g denied*, 444 U.S. 889 (1980), comes closer to our problem. In *Weber* the Court held that Title VII does not bar voluntary, private affirmative action undertaken by an employer in collaboration with a union, even when the plan is racially preferential or accomplished through a quota, so long as the plan is directed to eliminating "conspicuous racial imbalance in traditionally segregated job categories." *Id.* at 208-09. Although the court declined to "define in detail the line of demarcation between permissible and impermissible affirmative action," *id.* at 208, it noted that "the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees." *Id.*

The fourth Supreme Court case that bears, albeit tangentially, on the issue is *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). This case upheld the power of Congress to require in a congressional spending program that "10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from

businesses owned and controlled by members of statutorily identified minority groups." *Id.* at 453.

Although these decisions issued from a sharply divided court and were marked by separate concurrences and dissents, we think it is now firmly established that remedial relief for the effects of past discrimination need not be color-blind and that the use of minority-conscious percentage goals and quotas to overcome the present and ongoing effects of past discrimination is constitutionally permissible. *See United States* v. *City of Miami, Fla.*, 614 F.2d 1322, 1335 (5th Cir. 1980) and cases cited therein. We also think that *Weber* implicitly approves the use of such remedies in sections 1981 and 1983 cases as well as Title VII cases. *See Setser* v. *Novack Inv. Co.*, 657 F.2d 962, 966-67 (8th Cir. 1981) and cases cited therein.

None of the other Supreme Court cases, however, involve public employment nor address directly the situation before us; the conflict between a last hired, first fired seniority system and court orders seeking to maintain some semblance of racial balance in municipal Police and Fire Departments. There is no blinking the fact that there is significant difference between hiring and promoting in accord with a race-conscious ratio and insulating from discharge a percentage of employees because they are members of a minority group. In the former situation, there is only a postponement of expectations; in the layoff situation, employees with greater seniority lose their jobs. *See Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 696 n.12 (6th Cir. 1979); Judge Skelly Wright, *Color-Blind Theories and Color Conscious Remedies*, 47 U. Chi. L. Rev. 213, 238-40 (1980).

We do not think the issue can be resolved by simply following the Title VII cases and awarding constructive seniority to those minority members of the departments that can show that they were discriminated against by the entry examinations given in 1968-1970. This is not an action for damages. The relief sought originally was not for individuals, but to correct a condition of racial imbalance. We do not know the exact effect the award of constructive seniority to the iden-

tifiable victims of the past discrimination would have on the minority percentages of the departments. Considering, however, that more than ten years have passed, we do know that such a limited remedy would result in minority ratios far below that set by the district court.[14]

It must be stressed that the orders here do not require the continuation of the affirmative action programs by the hiring of minorities and the firing of whites. All they do is preserve the status quo at a 14.7 percent minority ratio for fire fighters and an 11.7 percent for policemen. Against a background of a present 30 percent minority population in Boston, this hardly can be deemed overreaching. Nor do we think it can fairly be characterized as "unnecessarily trammeling" the interests of the whites. *United States* v. *Weber*, 443 U.S. at 208. The fact of past discrimination agreed to in both cases constitutes a "compelling need" for a minority-conscious remedy. The proper test is one of reasonableness. *See Morgan, et al.* v. *O'Bryant, et al.*, Nos. 81-1561, 1617, 1618, 1619, and 1646, slip op. at 10-11 (1st Cir. February 17, 1982). The orders of the district court meet the test of reasonableness. They were necessary to prevent the departments from regressing to the state of precipitous racial imbalance that prevailed at the commencement of this litigation more than ten years ago.

We are acutely aware that some white policemen and fire fighters who, understandably, regard the seniority system as

[14] In response to an inquiry at oral argument, we have been informed that the earliest seniority date of minority police officers laid off is June 1980, and the earliest seniority date of laid-off white police officers is December 30, 1970. We have also been told that of the 258 police officers laid off, 34 are minority and that if it were not for the order of the district court, 130 minority officers, 126 white officers, and 2 oriental officers would have been laid off. As a result of the order, 81 minority officers were recalled so as to maintain the 11.7% minority representation in the department. On a percentage basis, the district court's order means that a little more than 13% of those laid off are members of the minority group.

an inalienable right and who have been innocent themselves of any discrimination will lose their jobs, at least temporarily.[15] We also must recognize that whites as a group reaped significant advantages in the past in hiring and promotion at the expense of blacks and hispanics and that a last hired, first fired seniority system perpetuates the past exclusion of minorities. This is not a case of wrong or right; it is a case of two competing rights, earned seniority versus racially balanced police and fire departments.

An important factor in these cases is that they involve the police and fire departments of a large metropolitan city that now has a minority population of at least 30 percent. We are concerned here not with simply redressing the rights of individuals who suffered racial discrimination; the issue is whether the progress made to date in integrating the departments will be preserved. As Judge Wyzanski noted, the public interest requires a racially balanced police force. *Castro* v. *Beecher*, 365 F. Supp. at 660. We do not need expert testimony to make the point that, unless the public safety departments of a city reflect its growing minority population, there is bound to be antagonism, hostility and strife between the citizenry and those departments. The inevitable

[15] If a fire fighter or police officer with permanent civil service status is laid off as a result of a reduction in force, that individual will be placed on reemployment lists by the Director of Personnel Administration. A reemployment list establishes for a laid-off fire fighter or police officer the right to be certified to all municipalities for a period of two years from his layoff, ahead of all other persons eligible for appointment as police officers or fire fighters. Mass. Gen. Laws Ann. ch. 31, § 40. In addition, a police officer or fire fighter has the right to be reinstated to a vacancy within the department from which he was laid off for five years after the date of his termination — again with preference over all other eligible applicants. Mass. Gen. Laws Ann. ch. 31, § 39.

The probable extent of recalls in both departments is not yet clear, although some evidence does exist that in fact reinstatement of at least some of the laid-off employees has taken place or will occur.

result is poor police and fire protection for those who need it most.

> The argument that police need more minority officers if not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions.

Detroit Police Officer's Ass'n v. *Young*, 608 F.2d 671, 696 (6th Cir. 1979).

It is significant that the only circuit case directly on point, *Brown* v. *Neeb*, 644 F.2d at 564, held: "To the extent that the seniority system is an obstacle to the city of Toledo's duty to eliminate past discrimination the district court can set it aside."

We find no constitutional bar. It is now accepted that minority-conscious quotas can be used as a tool to prevent discrimination and to advance integration of the work force in hiring and promotion situations. The imposition of constructive seniority to offset the effects of a last hired, first fired system has been used with increasing frequency since *Franks* in Title VII cases. While the orders place a relatively greater share of the burdens of the layoffs upon nonminorities, this does not constitute "reverse discrimination." The layoffs here were bound to cause undeserved injury in any event. While seniority was the normal way to decide who must go first, there is nothing magical about seniority, and here common sense suggests that it should be tempered by other entirely rational considerations so that the racial equity achieved at considerable effort in the past decade not be erased. In *Bakke*, not an employment case, the Supreme Court refused to enjoin the University from giving any con-

sideration to race in its admissions process. It is a simple fact that discrimination against blacks and other minorities was long accepted and condoned in this country. To a minority police officer or fire fighter hired within the last ten years, the imposition of a rigid last hired, first fired seniority system would only mean that once again the dominant white culture had protected its own kind at the expense of blacks and hispanics. If the evil of racial discrimination is to be fought openly, we must not allow ourselves to be caught in a semantic web of aphorisms such as "reverse discrimination" that in the final analysis serve only to perpetuate the discrimination of the past.

We rule that the district court had the equitable power to modify the consent decrees, that the Massachusetts statutory last hired, first fired seniority system is not insulated from the court's orders, and that the orders are not unconstitutional.

Affirmed.

United States District Court
District of Massachusetts.

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS.
Civil Action No. 72-3060-C

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

CITY OF BOSTON, ET AL.,
DEFENDANTS.
Civil Action No. 73-269-C

ORDER

August 7, 1981

CAFFREY, Ch. J.

This matter having come on for hearing on plaintiffs' motion to modify prior remedial orders; and the Court having considered the prior proceedings had herein, further evidence regarding proposed reductions in force affecting the Fire Department of the City of Boston, the parties' briefs and

the arguments of counsel; and the Court having found that a material change in circumstances—namely, the effective and proposed reductions in force—would nullify the Court's prior remedial orders and frustrate the intent of those orders; and the Court having found that modification of those prior remedial orders through entry of the within order is necessary to prevent that consequence, it is therefore, ORDERED, ADJUDGED AND DECREED as follows:

Exhibit 1

1. The defendant Fire Commissioner of the City of Boston is hereby restrained and enjoined from reducing, pursuant to any departmental or city program of reductions in force of firefighters on acount of lack of funds or abolition of position, the percentage of minority firefighters in the City of Boston Fire Department below the level of 14.7 percent of all firefighters.

2. For the purpose of implementing this order, the defendant Fire Commissioner of the City of Boston shall establish and maintain separate seniority lists of firefighters, one for minority firefighters and one for non-minority firefighters and shall use such separate lists in implementing any program of reductions in force on account of lack of funds or abolition of positions. Within each separate seniority list, the seniority of each firefighter shall be computed pursuant to statute, M.G.L. c. 31, § 33.

3. As firefighters in the Boston Fire Department are separated from their positions because of lack of funds or abolition of positions, the defendant Fire Commissioner may terminate firefighters according to strict seniority until the reduction in force results in a reduction of the percentage of minority firefighters below 14.7 percent. At that point, the Commissioner shall utilize separate seniority lists for minor-

ity and non-minority firefighters and shall terminate the least senior firefighters from each of the two lists according to a mathematical ratio so that the percentage of minority firefighters at no time falls below 14.7 percent. Nothing herein shall disturb application of Massachusetts statutory preferences; provided that such preferences are applied solely within the separate seniority lists.

4. In the event that a firefighter's appeal of his termination to the defendant members of the Massachusetts Civil Service Commission challenges the method of termination set forth herein, the defendant members of the Civil Service Commission are hereby restrained and enjoined from disapproving, invalidating or interfering with the termination on that basis.

5. For the purpose of continuing the implementation of this Court's prior orders, the defendant Personnel Administrator is ordered to place the names of all City of Boston firefighters who are laid off for lack of funds or abolition of position on the Civil Service re-employment and reinstatement lists in the order in which they are laid off. Reinstatement and re-employment of firefighters on such lists shall be accomplished by the Personnel Administrator and by the Fire Commissioner in reverse order of such layoffs and in a manner so that the percentage of minority firefighters does not fall below 14.7 percent. The Personnel Administrator, upon receipt of any requisition for hiring, shall certify names from such lists prior to certifying names from any other list.

6. The parties are instructed to confer and negotiate with respect to any further practices and procedures necessary and appropriate for the implementation of the provisions of this order.

[SIGNED]

Andrew A. Caffrey, Ch. J.

United States District Court
District of Massachusetts.

PEDRO CASTRO, ET AL.,
PLAINTIFF,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS.
Civil Action Nos. 70-1220-C, 74-2982-C

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS.
Civil Action No. 72-3060-C

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

CITY OF BOSTON, ET AL.,
DEFENDANTS.
Civil Action No. 73-269-C

OPINION

August 7, 1981

CAFFREY, Ch. J.

These four cases, all of which have long since gone to judgment, are before the Court on motions filed by the plaintiffs in each case to modify prior remedial orders. All four cases raise substantially the same legal issue, i.e., may the City of Boston in conducting reductions in force in the Boston Police and Fire Departments decide which police officers and which firemen to terminate on the basis of seniority as directed by M.G.L. c. 31 § 39, or must the City of Boston maintain the percentage of minority representation existing as of July 6, 1981 by persons who are either black or hispanic.

The past history of this litigation may be summarized as follows: The police case was begun and assigned to the Honorable Charles E. Wyzanski, Jr., who tried the case and entered a judgment, after which an appeal was taken to the First Circuit and the Court of Appeals filed an opinion giving directions for further proceedings by Judge Wyzanski. Judge Wyzanski made additional rulings and then subsequent litigation in the police case was assigned to and handled by the undersigned, including the monitoring of remedial measures. (For further background information see the undersigned's opinion of January 7, 1975 reported in 386 F. Supp. 1281.)

For present purposes suffice it to say that this action was commenced in 1970 by unsuccessful black and hispanic candidates for appointment as Boston Police officers. Plaintiffs claimed racial discrimination in the recruitment and certification practices initiated by the Massachusetts Civil Service Commission and implemented, through appointment procedures by the police forces of the City of Boston, other cities and towns, and other appointing authorities subject to Massa-

chusetts Civil Service regulations. Following trial, Judge Wyzanski made extensive findings, including findings that, in 1960, blacks represented 9 percent of the population of Boston and but 2 percent of its police force and, in 1970, 16.3 percent of the population and but 3.6 percent of the police force. Judge Wyzanski also found that the Massachusetts Civil Service Police Entrance Examination discriminated against minorities who did not share mainstream white culture. Judge Wyzanski held that plaintiffs had been discriminated against. 334 F. Supp. 943 (1971).

Appeal followed to the First Circuit. The Court of Appeals held that the civil service examinations were racially discriminatory. The Court of Appeals remanded the case with instructions that the district court enter a remedial order providing for implementation of a substantially job-related examination and providing for certification of black and hispanic applicants on a priority basis to be determined, under guidelines recommended by the Court of Appeals, by the District Court. The Court of Appeals insisted that relief "is to be more than token." 459 F.2d 725, 737 (1972).

On remand Judge Wyzanski approved and entered a comprehensive consent decree, finding that it was "just, reasonable and in the public interest, and more likely than any other proposed solution to give the people of the Commonwealth of Massachusetts effective non-discriminatory, dedicated, and honorable police forces...." 365 F. Supp. 655, 660 (1973). The remedial order provided, among other measures, for the establishment of civil service certification priority pools consisting of certain black and Spanish-surnamed applicants, and for the implementation of affirmative recruitment programs for the purpose of recruiting black and Spanish-surnamed police applicants. *Id.* at 660-662 (1973). Immediately prior to approval of the consent decree, Judge Wyzanski had issued an opinion exhorting the parties to reach agreement on the provisions of the decree, in the course of which he observed:

> "there is a *prima facie* presumption that on a job-related examination which is reasonably set to meet merely the requirements and not something above requirements of a police patrolman's job, the percentage of successful black and Spanish speaking persons who would choose to be patrolmen and who also meet the requirements of the job would nearly approximate the percentage of blacks and Spanish speaking persons in the population of the Commonwealth." *Id.* at p. 655.

In 1975 plaintiffs brought an action pursuant to the All Writs Act for the purpose of clarifying and preserving the effect of the prior consent decree in light of proceedings which had taken place in the Massachusetts Superior and Supreme Judicial Courts upon applications by certain Massachusetts cities and towns to establish the right to appoint police officers in accordance with certain statutory preferences. The action was assigned to the undersigned, who subsequently has supervised all aspects of the two consolidated police cases, including holding that statutory preferences were not displaced by the prior consent decree except to the extent that the preferences must be applied within the several groups established by the priority appointment procedures contained in the consent decree. I also further requested the parties to arrive at a substitute consent decree and recommended the remedy adopted in *NAACP* v. *Beecher*, 371 F. Supp. 507 (D. Mass.), *aff'd*, 504 F.2d 1017 (1st Cir. 1975). 386 F. Supp. 1281 (1975).

Thereafter, all parties entered into a consent decree, approved and entered by the Court on July 7, 1975. This consent decree provides, among other measures, for the establishment of priority certification groups for police applicants, for an affirmative recruitment program for black and hispanic applicants and for procedures for administration and

reporting with respect to police entrance examinations. This decree required certification of police applicants by methods in essence designed to facilitate the appointment by Boston and Springfield of one minority policeman for each white policeman, and to facilitate the appointment by other appointing authorities on a ratio of one to three. The decree also provided that the method and ratios of certification provided for by the decree shall apply to all cities and towns which have a minority population of one percent or more until any such city or town "achieves a complement of minorities commensurate with the percentage of minorities within the community," at which point further certification will be made in accordance with existing Massachusetts law. This parity target had been established by the Court in the *NAACP* v. *Beecher* decree to which I previously directed the parties.

On July 13, 1976, the writer approved and entered a supplemental consent decree. This decree contained further administrative procedures for monitoring the continuing implementation of prior decrees. This decree also exempted from further application of the method and ratios of certification contained in the July 7, 1975 consent decree the police departments of 81 cities and towns which had attained parity of the percentage of blacks and hispanics in police service with the percentage of blacks and hispanics in municipal population according to then current census statistics. Ninety one cities and towns plus the MBTA, MDC and Capitol Police forces remain subject to the decree.

On June 1, 1979 I further approved and entered an agreement as to the May, 1978 examination which provided, among other measures, for the continuing applicability of the method and ratios for certification provided for by the 1975 consent decree and for further recruitment activities and monitoring of the civil service examination.

As found in prior proceedings, in 1970 the Boston Police Department employed 2805 officers. Sixty-five of these were black or Spanish-surnamed, representing 2.3 percent. 459 F.2d at 728, 730. At the same time, the population of the city was 16.3 black. *Id.* at 728.

Since 1973, as a result of implementation of this Court's orders, Boston has increased the representation of minorities in the Police Department from 2.3 percent to 11.7 percent. Pursuant to the methods, ratios and procedures provided for by prior decrees, the Boston Police Department has hired, between 1974 and the present, 451 police officers, of whom 243 (53.88 percent) have been white and 208 (46 percent) have been Black, Spanish-surnamed and other minorities. However, the minority population of Boston has increased during the intervening decade to 30 percent. The percentage of black and hispanic officers in the Police Department, therefore, remains far below the percentage of minorities in the city and the parity level which the Court's prior remedial orders were designed to achieve.

Against this background, the City of Boston presently plans, and has begun to implement, massive reductions in work force in the Boston police and fire departments for alleged reasons of fiscal austerity.

I find on the basis of stipulations entered into by the parties on July 29, 1981, that reductions in force now being conducted, and scheduled for completion on August 18, 1981, would reduce minority representation in the police force to 6.2%, contrasted with the 11.7% as of July 6, 1981. Similar reductions in the Fire Department, to be completed on August 12, 1981, would leave a 9.1% minority representation, as compared with the 14.7% level of July 6, 1981.

The litigation involving the members of the Fire Department has followed a substantially similar course down through the years and is described with far greater specific-

ity than is necessary for present purposes in an opinion filed by Judge Freedman on February 8, 1974, reported in 371 F. Supp. 507 (1974). The firemen's cases were later transferred from Judge Freedman to the Honorable John J. McNaught, in whose temporary absence the firemen's cases are also being handled by the undersigned.

Given the foregoing, it should be noted that contrary to specious arguments for counsel for the state respondents, this motion does not constitute the filing of a new complaint, does not warrant respondents filing an answer, and does not require a new trial. Stating the matter affirmatively, this motion is a request that this Court modify a remedial decree which it has been monitoring for many years. The Court clearly has power to do so on the basis of both Rule 60(b)(6) of the Federal Rules of Civil Procedure and under its inherent equitable power. It was so ruled by the Supreme Court of the United States in *United States* v. *Swift*, 286 U.S. 106 (1932) where (at page 115) the Supreme Court stated:

> A Court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.

The standard to be followed by a district court in deciding whether and when to exercise its inherent right to modify a remedial decree was also stated by the Supreme Court in *United States* v. *Swift* (at page 119) where the Court told us:

> Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation.

I rule on the basis of the entire record of these cases from 1970 to date:

1. that the orders previously entered in all of these cases were decreed after years of litigation;

2. that the massive firings claimed by municipal authorities to be a result of the voters enacting Proposition 2½ amount to "new and unforeseen conditions" within the *Swift* ruling; and

3. that if this Court fails to modify the decree, as requested by plaintiffs' motions, then a grievous wrong would be produced by this Court's non-action, i.e., a refusal to amend the remedial order would allow the substantial eradication of all progress made by blacks and hispanics in securing public employment as members of either the police or fire departments since 1970.

4. that it is obvious from the opinion of the United States Court of Appeals for the First Circuit that using M.G.L. c. 31, § 39 to *de facto* reverse all of the results granted over the past 11 years would not be tolerated by that Court. *Cf. Brown* v. *Neeb*, C.A. No. 72-282, July 3, 1980 (N.D. Ohio); *aff'd* March 3, 1981 (6th Cir.).

It should be noted in view of the argument by various respondents that the earlier remedial decrees do not talk about terminations, that the argument first of all is factually fallacious in that both Judge Wyzanski and this writer have made reference to terminations, see Section IV, para. 5(e), Consent Decree by Wyzanski, J., 365 F. Supp. 655, 662 (1973), and para. 19(b), Consent Decree by Caffrey, Ch. J., unreported, July 7, 1975. Secondly, and more importantly, it is beyond argument that, given the nature of the remedial decrees directed by the Court of Appeals, and given the objective thereof, namely bringing minority representation up to a level approximating the percentage of the total population which the minorities represent in the community, that if anything similar to Proposition 2½ had been in effect at the time that the remedial decrees were originally entered, these decrees would have been fashioned to make allowances for terminations so that the minority representation on both

departments could have been maintained if not increased notwithstanding the then hypothetically ongoing terminations.

Accordingly, I rule that an order should enter granting plaintiffs' motions to modify prior remedial orders and enjoining respondents from reducing the percentage of black and hispanic police officers on the City of Boston police force below the 11.7% of July 6, 1981, and enjoining the City of Boston from reducing the number of black and hispanic members of the Fire department below the 14.7% of July 6, 1981.

[SIGNED]

Andrew A. Caffrey, Ch. J.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

Amendment V, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES.

42 U.S.C. 1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. 1988:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

CIVIL RIGHTS ACT OF 1964:

Section 703(a), 42 U.S.C. § 2000e-2(a)

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(h), 42 U.S.C. § 2000(e)-2(h)

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful em-

ployment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Section 703(j), 42 U.S.C. § 2000(e)-2(j)

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Section 706(g), 42 U.S.C. § 2000(e)-5(g)

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back

pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

MASSACHUSETTS GEN. LAWS CH. 31

Section 33

For the purposes of this chapter, seniority of a civil service employee shall mean his ranking based on length of service, computed as provided in this section. Length of service shall be computed from the first date of full-time employment as a permanent employee, including the required probationary period, in the departmental unit, regardless of title, unless such service has been interrupted by an absence from the payroll of more than six months, in which case length of service shall be computed from the date of restoration to the payroll; but upon continuous service following such an absence for a period of twice the length of the absence, length of service shall be computed from the date obtained by adding the period of such absence from the payroll to the date of original

employment; provided, however, that the continuity of service of such employee shall be deemed not to have been interrupted if such absence was the result of (1) military service, illness, educational leave, abolition of position or lay-off because of lack of work or money, or (2) injuries received in the performance of duty for which compensation was paid pursuant to chapter one hundred and fifty-two, provided that the employee notifies the appointing authority, in writing, not later than six months after the final payent of compensation aforesaid that he is ready, willing, and able to do his former work and files with said appointing authority a certificate of a registered physician that he is able to perform the duties of his position in an efficient manner, and is restored to the payroll.

If, as a result of a reinstatement made pursuant to section forty-six, a person is restored to employment in a departmental unit other than that in which he formerly held full-time employment as a permanent employee, his length of service shall be computed from the date of his first employment under such reinstatement, but upon continuous service in such unit for three years or twice the length of his absence from the payroll, whichever is greater, his length of service shall be computed as though such earlier employment had been in the departmental unit to which he has been reinstated.

If the employment of such full-time employee is changed through an original or promotional appointment or transfer from one departmental unit of the commonwealth to another under the same appointing authority, or from one departmental unit to another within the same department in a city or town, the length of service of such employee in the unit to which the appointment or transfer is made shall be computed from the date which was used to compute his length of service immediately prior to such appointment or transfer. If the

employment of such full-time employee is changed through an original or promotional appointment from one department unit of the commonwealth to another not under the same appointing authority, from one departmental unit to another not within the same department in a city or town, from one city or town to another, from a city or town to the commonwealth, or from the commonwealth to a city or town, the length of service of such employee shall be computed from the date of such change of employment, but if the employee completes one year of service in the new employment, from the date which was used to compute the employee's length of service immediately prior to the change of employment.

If the employment of such full-time employee is changed by transfer from one departmental unit of the commonwealth to another not under the same appointing authority, from one departmental unit to another not within the same department in a city or town, from one city or town to another, from a city or town to the commonwealth, or from the commonwealth to a city or town, the length of service of such employee shall be computed in the following manner: (1) if the transfer was made upon the request of the employee, the length of service shall be computed from the date of such transfer, but if the employee completes three years of service in the new employment, from the date which was used to compute the employee's length of service immediately prior to the transfer; (2) if the transfer was not upon the request of the employee, the length of service shall be computed from the date which was used to compute the employee's length of service immediately prior to the transfer.

The length of service of a permanent employee appointed on less than a full-time basis shall be computed from the date of such appointment, without regard to absences from the payroll which were not voluntary on the part of such employee. Regardless of actual length of service, permanent

employees appointed on less than a full-time basis shall, for purposes of determining seniority, rank below all full-time permanent employees.

Section 39

If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the five-year period following the date of such separation.

Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one. Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority, within seven days of receipt of such notice, a written consent to his being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower title or titles there is an employee junior to him in length of service. As soon as suffi-

cient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed.

Nothing in this section shall impair the preference provided for disabled veterans by section twenty-six.

SCHEDULE OF CITATIONS TO OTHER STATES' SENIORITY STATUTES

Ala. Code § 36-26-26 (1975)

Alaska State. § 39.25.150(15) (1981)

Ariz. Rev. Stat. Ann. § 41-483(14) (1974)

Ark. Stat. Ann. § 19-1615 (1968)

Del. Code Ann. tit. 29, § 5928 (1979)

D.C. Code Ann. § 1.625.2(a)(1) (1981)

Fla. Stat. Ann. § 110.227(3)(b) (1982)

Ill. Ann. Stat. Ch. 127 § 63b108b 13 (1981)

Ind. Code Ann. § 4-15-2-32 (1982)

Iowa Code Ann. § 400.28 (1976)

Kan. Stat. Ann. § 75-2948 (Supp. 1979)

Ky. Rev. Stat. § 18.210(14) (1980)

Mo. Ann. Stat. § 36.360 (1969)

N.J. Stat. Ann. § 11:13-2 (1976)

N.Y. Civil Service Law § 80(1) (1982)

Ohio Rev. Code Ann. § 124.32 (Supp. 1981)

Okla. Stat. Ann. tit. 74, § 833 (Supp. 1981)

Pa. Stat. Ann. tit. 71, § 741.802 (1962)

R.I. Gen. Laws § 36-4-37 (1969)

S.C. Code § 47-763 (1962)

Tenn. Code Ann. § 8-30-320 (1980)

Utah Code Ann. § 67-19-18(4) (Supp. 1981)

Wis. Stat. Ann. § 16.28(2)(a) (1972)

Wyo. Stat. § 15.1-296 (1957)

United States Court of Appeals For the First Circuit

Misc. No. 81-8053.

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS-APPELLEES,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS-APPELLANTS.

MEMORANDUM AND ORDER

Entered August 31, 1981

Intervenor Local 718 of the Boston Firefighters' Union has not met the applicable standards for a party seeking a stay of an injunction pending appeal. *Martinez Rodriguez* v. *Jimenez*, 537 F.2d 1, 2 (1st Cir. 1976) (per curiam).

(1) Local 718 has not made a "strong showing that [it] is likely to succeed on the merits of the appeal." *Id.* Indeed, the law is unsettled as to the proper solution when economic conditions force layoffs following the institution of affirmative action programs to remedy past discrimination. *Compare*, *Brown* v. *Neeb*, 644 F.2d 551 (6th Cir. 1981), *with Chance* v. *Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977).

(2) We do not deny that those non-minority firefighters who may be laid off as a result of the August 7 order will suffer in-

jury. However, since minority firefighters laid off under strict seniority are equally harmed, Local 718 has "failed to demonstrate irreparable harm during the pendency of this appeal that would substantially outweigh the injury to the plaintiffs." *Martinez Rodriguez, supra* 537 F.2d at 2.

(3) Intervenors assertion at page 7 of their motion that "[t]here is a lack of substantial injury to the other parties" is disingenuous. Any firefighter who loses his job will suffer injury whatever the color of his skin.

(4) The union claims that the public interest will not be harmed by the granting of a stay because the percentage of minority firefighters, even if the layoffs occur, will be higher than it was when plaintiffs originally brought suit. The local also stresses the importance of avoiding racial divisiveness. Plaintiffs counter that the risk of increased racial tension resulting from the August 7 order is speculative and suggest that the union might have some role in the creation of any such antagonism. We are not unmindful that however any necessary reduction is accomplished, those who lose their jobs will suffer. These are difficult times. But on balance, we believe that the public interest in maintaining recent gains in minority employment for a brief period pending appeal, outweighs the speculative harm of any temporary increase in racial tensions. We further note that even the 14.7% minority figure which the district court order requires to be maintained is less than the proportion of minority population in the city of Boston. See, *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F.2d 1017, 1020 n.4 (1st Cir. 1974).

The petition for stay is denied.

By the Court:

[SIGNED]

Dana H. Gallup
Clerk.